United States District Court,
C.D. California.

NATURAL RESOURCES DEFENSE COUNCIL, et al., Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE NAVY, et al., Defendants.

No. CV–01–07781 CAS(RZX).
Sept. 17, 2002.

Opinion

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

SNYDER, J.

I. INTRODUCTION

The action seeks to enjoin the activities of the United States Department of the Navy's (the "Navy") Littoral Warfare Advanced Development Program ("LWAD" or "LWAD Program").[1] Specifically, plaintiffs, a group of environmental organizations, seek to enjoin any active sonar test or other operation carried out under the aegis of the LWAD Program that may adversely affect marine wildlife until the Navy conducts the environmental studies allegedly required by the National Environmental Policy Act ("NEPA"), 42 U.S .C. § 4321 *et seq.,* obtains permits allegedly required by the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.,* and undertakes consultations required by the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.,* and the Magnuson–Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1802 *et seq.* The parties are currently before the Court on cross-motions for summary judgment.

A. The LWAD Program

Since 1996, LWAD has supported or overseen at least seventeen "sea tests" of experimental anti-submarine warfare technologies, including active sonar, in littoral waters in various locations around the globe. Certification of the Administrative Record by Scott Martin Tilden ("Tilden"), LWAD Project Manager ("Cert.") ¶ 16. The purpose of the sea tests is to provide a robust, "real world" environment for the testing and demonstration of anti-submarine warfare technologies that the Navy may want to acquire. LWAD has various responsibilities with respect to each sea test. First, LWAD conducts planning meetings where long term schedules and program objectives are prioritized. A.R. Docs. 11, 16, 17, 27. Materials prepared for at least some of these meetings appear to set forth in some detail the siting of future sea tests and the technologies that will be employed in those tests. For example, a report to the LWAD Advisory Board dated June 27, 2000, and entitled "Project Plans," describes the proposed approximate location and likely technologies to be tested for nine proposed sea tests to be conducted in 2001, 2002, and 2003. A.R. 49, Encl. 7. Second, LWAD consults with scientists developing new technologies in order to understand their testing requirements and "assists in designing the sea tests" to better incorporate those requirements and to facilitate the testing of multiple, yet compatible technologies. Cert. ¶ 18. Third, LWAD schedules fleet assets such as ships

and submarines to serve as platforms for the technology to be tested, and installs and deinstalls that technology on the platforms. Cert. ¶ 18; A.R. Doc. 27. Requests for fleet assets must be submitted six to nine months before the test. A.R. Doc. 23 at 6; Deposition of Scott Martin Tilden ("Tilden Depo.") at 70–71. Fourth, during the test, LWAD provides scientific support by collecting environmental data "as required by the projects to support their technical analysis." Tilden Depo. at 113.

There is no dispute that LWAD is intimately involved in the sea testing process, but the parties disagree as to the extent and the significance of LWAD's involvement in that process. Plaintiffs assert that LWAD is "responsible for making all of the significant decisions regarding the LWAD Program and the sea tests," Plaintiffs' Motion for Summary Judgment ("Pls.' Mot.") at 7, and that the LWAD Advisory Board and Program Manager determines which technologies are included in each sea test, and when and where the sea tests occur. *Id.* Plaintiffs assert that the design of the sea tests to date has been consistent with a tightly focused mission of testing a relatively small number of anti-submarine warfare technologies, and that many of these technologies have been tested repeatedly. *Id.* at 9 (citing sea test project plans documented at A.R. 6, 8, 10, 13, 19, 22, 24, 30, 34, 38, 40, 44, 46, 52, 54). In particular, plaintiffs assert that virtually every sea test scheduled so far has included active sonar or some other tactical acoustical system capable of generating intense sounds. Plaintiffs assert that the LWAD establishes long-term priorities for testing, and coordinates and plans individual sea tests well in advance. *Id .* at 10. Plaintiffs note that in several cases, LWAD has conducted multiple sea tests in the same general operation area. For instance, plaintiffs assert that at least five sea tests have been conducted in the general vicinity of the South Atlantic Bight, in the Carolina Capes area off the southeastern coast of the United States, with most of the testing situated in Long Bay, east of Charleston, South Carolina. *Id.* at 11 (citing to A.R. 8, 19, 30, 44, 54). Similarly, plaintiffs assert that at least five sea tests have been conducted in roughly the same area in the southern Gulf of Mexico. *Id.* at 12. Plaintiffs also argue that LWAD makes environmental decisions at the program level, for instance, by applying certain unwritten policies about avoiding marine mammals to all proposed sea tests. The crux of plaintiffs' argument in this case is that LWAD and the sea tests it plans constitute a single program that has a cumulative adverse effect on marine species and environments over and above the effect of any one sea test. For this reason, plaintiffs argue that the Navy can only comply with the applicable environmental laws if it engages in an environmental impact analysis and consults with the applicable federal agencies for the LWAD program as a whole, rather than the individual sea tests.

By contrast, the Navy asserts that LWAD is merely "an inter-office support function [which] facilitate[s] and coordinate[s] the testing of potential technologies, produced by discrete teams of scientists, for use in littoral anti-submarine warfare." Defendants' Motion for Summary Judgment ("Defs.' Mot.") at 12; *see also* A.R. Doc. 2, Encl. 5 (LWAD is "the coordinating activity for a spectrum of sea test efforts"), A.R. 3 (purpose of LWAD is to "facilitate" the "transition to advanced technology"), *www.onr.navy.mil/oas/info/lwad* (LWAD provides "the science, planning, and logistics support framework to enable cost-effective [littoral anti-submarine warfare] experimentation and

demonstration”). The Navy further asserts that LWAD does not develop or fund technology development, and has no full time staff and no office: the primary LWAD project team consists of a Chief Scientist from Johns Hopkins University, a Test Director from the Naval Undersea Warfare Center, a contractor, and the ONR's Project Manager. Cert. ¶ 6, 13. Therefore, according to the Navy,

> although LWAD is referred to as a project in most literature, and in some instances as a program, it is neither a project nor a program in the traditional sense.... Rather, LWAD's basic concept is to facilitate the testing of a number of different technologies, each of which is being developed by discrete teams of scientists funded in large part by the ONR. [ ] Facilitating the joint testing of these otherwise disparate projects makes good business sense, because it avoids the need for each discrete project to maintain its own staff to perform the functions that the LWAD team performs. [ ] Facilitating joint testing of otherwise disparate projects also makes sense scientifically. It permits the Navy to compare how effective different technologies are in detecting the same target. It also permits the Navy to assess whether different technologies when used in combination are more effective in detecting and tracking a target than if each were used separately. Finally, facilitating joint testing makes sense operationally, because the fleet gets the opportunity to get an early look at potential technologies, to understand their potential, and—critically—to provide feedback on how a promising technology can be developed to best serve future operational needs.

Cert. at 13–15. In sum, the Navy contends that LWAD oversees and coordinates the projects that make up the sea tests, but that those projects would exist independently of LWAD. Furthermore, the Navy contends that LWAD does not exercise the degree of control over the sea tests that plaintiffs suggest. Rather, LWAD puts forth proposals which are then modified repeatedly and often on short notice in response to changes in (1) the readiness of technologies for testing, (2) the short term availability of fleet assets, (3) weather, and (4) other considerations such as the need to coordinate with larger fleet exercises whose scheduling is completely out of the control of LWAD. Therefore, the Navy contends that it cannot create environmental impact reports or consult with federal agencies at a programmatic level because its plans for proposed sea tests are always subject to change as to location, date, and technologies tested. The Navy argues that for that reason, and given the wide variety of marine life that can be encountered in the littoral ocean, both at different locations on the globe and different times of year, it would be impossible to predict the effects of a program of sea testing in general with the degree of specificity necessary to comply with an EIS or consultation requirement directed towards the LWAD program in its entirety.

B. Active Sonar's Potential Adverse Effects on Marine Wildlife

There appears to be agreement among scientists that high intensity underwater sounds, such as those generated by active sonar, can induce a range of adverse effects in whales, dolphins and other marine wildlife. These effects can include, among other things: temporary or permanent loss of hearing; abandonment of habitat; disruption of mating, feeding, nursing, and migrating; and the making of biologically meaningful sounds. *See, e.g.,* Declaration of Joel Reynolds, Ex. 20 (chapter

excerpt entitled “Underwater Noise Pollution and its Significance for Whales and Dolphins” from *The Conservation of Whales and Dolphins* (M.P. Simmonds & J.D. Hutchinson eds., John Wiley & Sons Ltd.1996)); *see also id.,* Exs. 21–28 (additional scientific studies). In addition to the independent scientific record, the Navy's own inquiry into the effects of high intensity active sonar on marine mammals acknowledges its potential dangers. In its EIS for another active sonar program distinct from LWAD,

> the Navy stated there is growing evidence that man-made sounds can sometimes disturb marine mammals.... Many marine mammals rely on sound for communication, navigation, or detection of predators and prey. Disruption of any of these biologically important functions could interfere with normal activities and behavior, and thereby might impact the reproductive success of individuals and eventually the size of the population.

Reynolds Decl. Ex. 17 (January 2001 Final Overseas Environmental Impact Statement and Environmental Impact Statement for Surveillance Towed Array Sensor System Low Frequency Active Sonar).

The analysis of mass strandings, or beachings, of marine mammals is another source of evidence of the harmful effects of active sonar. For example, a multi-species stranding occurred along the coast of the northern Bahamas in March 2000. Seventeen cetaceans, including Cuvier's beaked whales, minke whales and a spotted dolphin, are known to have stranded over a two day period; at least seven of those are known to have died. At the time of the strandings, a number of Navy vessels were in the vicinity, and were operating a military sonar system, “53–Charlie,” that has been used in at least four LWAD sea tests. Reynolds Decl., Ex. 21 (Joint Interim Report Bahamas Marine Mammal Stranding Event of 14–16 March 2000) at 1237. In that case, a task force headed by the National Marine Fisheries Service (“NMFS”) and the Navy concluded that, on the basis of autopsy date, time-distance analysis, and other evidence, the “most plausible” cause of the stranding was the 53–Charlie sonars. *Id.* at 1236.

C. LWAD Environmental Compliance Efforts To Date

The Navy argues that it has carefully analyzed the environmental impacts of every LWAD test that has actually been conducted. The Navy argues that in every case where it was required, it completed an Overseas Environmental Assessment (“OEA”). In each case, the OEA concluded that an EIS was not necessary because the sea test was unlikely to adversely affect any endangered or threatened species or their critical habitat. The Navy also argues that it entered into informal consultations with NMFS under the ESA where appropriate, and that in all but one instance NMFS has agreed that formal consultation was not necessary because there was no likelihood of adverse effect on listed species. In that one instance, LWAD sea test 00–2, the Navy initiated informal consultation with NMFS approximately one month before the scheduled sea test. The Navy argues that this thirty-day time frame was consistent with the previous consultations and with NMFS policy on consultation. However, NMFS determined that it needed more time to review the agency action

and recommended formal consultation for LWAD sea test 00–2. Rather than pursue formal consultation, and given the time constraints of LWAD 00–2, the Navy decided to cancel the active sonar portion of the test. In the two subsequent sea tests which have actually taken place, the Navy has not consulted with NMFS because it has made a threshold determination that its proposed action will not affect any listed species. It is not clear from the record what sort of consultations, if any, took place regarding sea test 02–2, which was one of the original subjects of this lawsuit and which was subsequently cancelled.

Plaintiffs view the Navy's compliance efforts in a different light. First, plaintiffs question the adequacy and correctness of the OEAs and the consultations conducted prior to sea test 00–2. Plaintiffs argue that the Navy exerted significant pressure on NMFS in order to obtain agreement from them that the sea tests would have no significant effect on listed species.[5] Similar pressure was supposedly applied in conjunction with the OEA for sea test 00–2, which NMFS ultimately deemed inadequate.[6] Plaintiffs argue that the NMFS' reaction to the documentation for sea test 00–2 gave the Navy clear notice that NMFS considered its OEA methodology inadequate, and demonstrated that there was a greater likelihood of interference with listed species than the Navy assumed. For example, a letter dated May 19, 2000, from NMFS to the LWAD Program Manager regarding the Navy's determination that sea test 00–2 would have no significant impact on endangered or protected species contains the following criticisms:

A major limitation in NMFS review of this project was the amount of time the Northeast Region [ ] had to assess its potential effects of listed species....

> In addition, the OEA [for sea test 00–2] lacks a “Pre–Experimental Environmental Characterization for [LWAD 00–2] Experiment.” Such a document provides information concerning the acoustical systems and specific environmental acoustic concerns with respect to evaluating results and operational limitations at sea....
>
> The OEA's information on acoustics underestimates the biological impacts to animals exposed to these sound levels.... The Zones of Influence (ZOI) [of the sonar to be tested] are questionable and require more time to determine their accuracy.
>
> The information provided in the OEA on the acoustics appears to be incomplete and therefore [it is] difficult to assess the project's impacts....
>
> The method[ ] used to assess the potential to affect listed species appears to rely on assumptions that are unrealistic and are not well supported in the OEA. For instance, assumptions concerning animal densities (presence or absence) in the operation area are not based on the most recent updated, field information.... In addition, the method used in the OEA to calculate density for species by dividing the North Atlantic abundance estimates by the number of square miles of the Mid–Atlantic Bight area ignores the variation in species' distribution along this portion of the continental shelf and deep waters of the operation area as well as the seasonal variations and behavioral aspects of sperm whales and sea turtles....

> The conclusions reached in the OEA appear to be based on limited information and have not considered the most recent studies. A review of the available updated material would have provided a more accurate assessment of the distribution and abundance of animals including behavioral effects....
>
> For the reasons explained above .... we do not concur with your determination that the proposed action is not likely to adversely affect listed species under NMFS jurisdiction. Therefore, NMFS recommends formal consultation under Section 7 of the ESA.

Reynolds Decl., Ex. 37 at U.S. 963–66. Nonetheless, the Navy chose not to consult at all for the next two sea tests it conducted, and there is no evidence in the record that it consulted for Sea Test 02–2, which was scheduled to take place in March 2002, not long after this law suit was filed. Plaintiffs argue that this pattern of pressure and avoidance demonstrates that the Navy is not making a good faith effort to comply with environmental laws.

D. The Claims

Plaintiffs allege five claims for relief. First, plaintiffs allege that all activities conducted under the LWAD program effectively constitute a single course of conduct which may significantly affect the environment. Therefore, plaintiffs argue that the LWAD program must be evaluated in a single program-wide environmental assessment ("EA") or environmental impact statement ("EIS"), and that the Navy's failure to prepare such a programmatic EA or EIS constitutes a violation of NEPA. First Amended Complaint ("FAC") ¶¶ 112–15. Second, plaintiffs allege that Sea Test 02–2 standing alone is a major federal action significantly affecting the quality of the human environment and that the Navy's failure to prepare an EIS for Sea Test 02–2 is therefore a violation of NEPA. Plaintiffs also allege that the Navy's likely issuance of a finding of no significant impact on the environment or protected species for Sea Test 02–2 is arbitrary and capricious and therefore an abuse of discretion under the APA. FAC ¶¶ 116–19.[7] Third, plaintiffs claim that individual LWAD sea tests, including Sea Test 02–2, will result, or have the potential to result, in the take of an unknown number of marine mammals, and that the Navy's failure to apply to the NMFS for a small take or incidental harassment permit for those sea tests violates the MMPA. FAC ¶¶ 120–24. Fourth, plaintiffs allege that the LWAD Program as a whole is likely to adversely affect species listed as endangered or threatened under the ESA, and that the Navy's failure to enter into formal or informal consultations with NMFS regarding the LWAD program violates ESA. FAC ¶¶ 126–130. Fifth, plaintiffs allege that the LWAD Program as a whole, and each individual sea test, may adversely affect fish habitat designated for protection under MSA, and that the Navy's failure to consult with the NMFS concerning these adverse effects is a violation of the MSA. FAC ¶ ¶ 131–35.

Plaintiffs seek partial summary judgment as to their first and fourth claims alleging that the Navy must (1) perform a programmatic analysis of LWAD pursuant to NEPA, and (2) engage in formal programmatic consultations with the NMFS for LWAD as a whole. The Navy seeks summary judgment as to all claims, arguing that plaintiffs do not have standing to challenge the LWAD

program. In the alternative, the Navy seeks summary judgment as to plaintiffs' first and fourth claims, arguing that: (1) plaintiffs' claim for programmatic NEPA review is barred because the LWAD "program" is not reviewable final agency action and because NEPA has no extraterritorial application; and (2) plaintiffs' claim for programmatic ESA consultation is barred because LWAD as a whole has not issued a programmatic planning document, programmatic consultation would be impractical, and the ESA has only limited extraterritorial application.

II. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed.R.Civ.P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit."*Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). *See also Celotex Corp.,* 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.*See also Abromson v. American Pacific Corp.,* 114 F.3d 898, 902 (9th Cir.1997). In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 631 & n. 3 (9th Cir.1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.,* 121 F.3d 1332, 1335 (9th Cir.1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita,* 475 U.S. at 587.

III. DISCUSSION

A. Standing

1The Navy argues that summary judgment should be granted in its favor because plaintiffs do not have standing to challenge the LWAD "program" as a whole, but rather plaintiffs must limit their challenge to individual sea tests. In order to establish standing, plaintiffs must demonstrate that they have a "personal stake" in the alleged dispute and that their alleged injury is "concrete and

particularized." *See. e.g.,* *Bennett v. Spear,* 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). The Navy argues that plaintiffs cannot establish concrete and particularized injury in this case for two reasons. First, the Navy argues that LWAD itself is no more than an intra-agency coordinating and facilitating function which could not conceivably cause plaintiffs any injury. Second, the Navy argues that in order to establish standing for their requested relief—namely a programmatic environmental assessment of all potential LWAD activities anywhere in the world and an injunction against those activities until the assessment is completed—plaintiffs must demonstrate that they would suffer concrete injury wherever an LWAD test might conceivably be held. In support of this argument, the Navy cites *Lujan v. Defenders of Wildlife,*504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), where the Supreme Court denied a NEPA challenge to federal agency action that allegedly affected tiger habitat in Sri Lanka made by United States citizens who alleged that they worked with endangered tigers and/or enjoyed observing them in the wild, but failed to allege that they had concrete plans to visit the particular area of Sri Lanka where the allegedly threatened habitat was located. In *Lujan,* the Supreme Court held that even assuming that a person who worked directly with a particular species in a part of the world where that species was threatened by a federal agency decision could show standing, "it goes beyond the limit, ... and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." *Id.* at 567.

Plaintiffs respond that they have submitted numerous declarations from members of their organizations who have professional or aesthetic interests in marine wildlife and who have worked or recreated in areas where LWAD has conducted or proposed to conduct sea tests. *See. e.g.,* Declaration of Richard Czina; Declaration of Commander Arthur Immerman; Declaration of Steve Simmons; Declaration of Nancy Marr. As to the Navy's first argument, plaintiffs contend that the cognizable injury they have sustained under the ESA and NEPA is not based on the direct effects of LWAD's sonar testing activities, but on its failure to properly assess the environmental effects of its sea test program. All that is necessary to show standing under NEPA and the ESA is that plaintiffs might potentially be injured because " 'environmental consequences might be overlooked,' as a result of deficiencies in the government's analysis under environmental statutes." *Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346, 1354–55 (9th Cir.1994)(citations omitted). As to the Navy's second argument, plaintiffs contend that the Navy is incorrect that they must show that their members would be affected by an LWAD sea test anywhere it might be conducted. Rather, it is sufficient to show that plaintiffs have an interest in some portion of the affected environment or environmental resource. *See. e.g., Japan Whaling Ass'n v. American Cetacean Society,* 478 U.S. 221, 230 n. 4, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). Here, unlike *Lujan,* plaintiffs have demonstrated the requisite connection, in that they provide evidence that they have observed and enjoyed wildlife in many of the specific areas where LWAD operations have

been conducted to date. Accordingly, the Court finds that plaintiffs have standing to pursue their claims, and denies the Navy's motion for summary judgment on this ground.

B. NEPA

NEPA was enacted in 1970 with the purpose of "promot[ing] efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. Section 102(2)(c) of NEPA requires federal agencies to prepare, consider and approve an environmental impact statement ("EIS") for any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS analyzes the potential environmental impacts, alternatives and mitigation opportunities for major federal actions in order to insure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the federal government. 40 C.F.R. § 1502.1. As examples of "major Federal actions," NEPA regulations include: "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan [and] systematic and connected agency decisions allowing agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3). The regulations also set forth circumstances under which broad agency actions must be addressed in a single, programmatic EIS. In general, "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a).

"In determining whether to prepare an environmental impact statement the Federal agency shall ... prepare an environmental assessment." 40 C.F.R. § 1501.4(b). An environmental assessment is "a concise public document" that serves, among other things, to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *Id.* An environmental assessment is intended to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. 1500.1(b). If the environmental assessment concludes that a proposed action will not have a significant effect on the environment, the federal agency prepares a "finding of no significant impact." 40 C.F.R. § 1508.13.

Plaintiffs argue that the LWAD program as a whole is a major federal action which may significantly affect the environment. As such, plaintiffs argue that NEPA requires the Navy to prepare an EIS, or at least an EA, for the program as a whole, rather than assessing LWAD on a sea test by sea test basis. The Navy responds that: (1) LWAD is not subject to NEPA because LWAD sea tests are conducted outside the United States and there is a presumption against the extraterritorial application of United States laws; and (2) NEPA only applies to major federal *actions* and there is no action, other than individual sea tests, for plaintiffs to challenge. The Court will consider these arguments below.

1. Does the presumption against extraterritoriality bar the application of NEPA in this case?

234The Navy moves for summary judgment, arguing that plaintiffs' claim for a programmatic NEPA review of LWAD is barred because of the presumption that absent explicit intent to the contrary,

domestic legislation such as NEPA does not apply outside United States territory. Congress legislates against the backdrop of a presumption that United States statutes will not have extraterritorial application. *Equal Opportunity Comm'n v. Arabian American Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). Courts "look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." ' *Id.* (quoting*Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949)). Extraterritorial application must be expressed through a "plain statement of extraterritorial statutory effect." *Astoria Federal Savings & Loan Ass'n v. Solimino,* 501 U.S. 104, 109, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). The Navy argues that NEPA contains no such statement and therefore does not apply to the many LWAD sea tests which take place outside of United States territorial waters. If those individual sea tests are not subject to NEPA review, then programmatic review is also not appropriate.

Plaintiffs respond that the presumption against extraterritoriality does not apply here for several reasons. First, plaintiffs argue that courts have found that as a purely procedural statute governing environmental planning, NEPA's effect is limited to where that planning takes place. Because it is undisputed that LWAD sea tests are planned within the United States, plaintiffs argue that the presumption against extraterritoriality is not implicated in this case. Second, plaintiffs argue that the presumption against extraterritoriality does not apply to areas where the United States exercises significant sovereignty and legislative control. Most of the LWAD sea tests have been conducted in the United States Exclusive Economic Zone ("EEZ"), where plaintiffs argue the United States exercises the requisite degree of legislative control to trigger the application of NEPA.[8] Finally, plaintiffs argue that many of LWAD's sea tests have been conducted in such close proximity to the territorial waters of the United States, that they have likely affected marine wildlife that transits those waters. The Court will consider these arguments below.

The Court of Appeals for the District of Columbia Circuit has held that the extraterritoriality analysis does not apply to NEPA. In*Environmental Defense Fund, Inc. v. Massey,* 986 F.2d 528 (D.C.Cir.1994), the Court of Appeals for the District of Columbia Circuit held that the National Science Foundation ("NSF") was bound by the environmental assessment requirements of NEPA when it approved the construction of a waste disposal facility in Antarctica. *Id.* at 536. In reaching that decision, the court explicitly rejected NSF's argument that the presumption against extraterritoriality bars NEPA's application to agency decisions with impacts outside United States territory. *Id.* at 531–32. The *Massey* court stated that when the activity regulated by the statute occurs largely within the United States, the presumption does not apply, "[e]ven where the significant effects of the regulated conduct are felt outside U.S." *Id.*at 531. The *Masscy* court then concluded that "NEPA is designed to control the decisionmaking process of U.S. federal agencies, not the substance of agency decisions" and that therefore the activity being regulated by NEPA was not the construction of the waste facility in Antarctica itself, but the agency decisionmaking process that authorized that construction. *Id.* at 532. Because the NSF had conducted its decisionmaking process

largely within the United States, the Court of Appeals for the District of Columbia Circuit found that NEPA "impose[d] no substantive requirements which could be interpreted to govern abroad," and the presumption against extraterritoriality did not apply. *Id.* at 533; *see also Gushi Bros. v. Bank of Guam,* 28 F.3d 1535, 1538 (9th Cir.1994) (citing *Massey*for the principle that "[q]uestions involving the reach of Congress' prescriptive jurisdiction are not implicated when the conduct sought to be regulated occurs within the United States"). Although the *Massey* decision is not binding precedent, the Court finds its reasoning persuasive. Like the NSF's decision at issue in *Massey,* planning for the LWAD program takes place entirely in the United States and is therefore not subject to the presumption against extraterritoriality.

The Navy's arguments that *Massey* should be disregarded are unavailing. First, the Navy argues that under the interpretation of the extraterritoriality principle set forth in *Massey,* most federal programs abroad would be governed by United States laws, even in the absence of a clear statement by Congress, because planning for those programs takes place in the United States. However, this argument overlooks the uniqueness of NEPA, which is a purely procedural statute that, as the *Massey* court discussed, has no substantive effect outside the United States. Second, the Navy argues that the holding in *Massey* conflicts with several other decisions that found that NEPA was not applicable to federal actions taken outside the United States. *See Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n* (*"NRDC v. NRC"*), 647 F.2d 1345 (D.C.Cir.1981); *NEPA Coalition of Japan v. Aspin,* 837 F.Supp. 466 (D.D.C.1993); *Greenpeace USA v. Stone,* 748 F.Supp. 749 (D.Haw.1990). However, in each of these cases, the court's rationale for finding that NEPA did not apply to particular actions was that its application would implicate important foreign policy concerns or demonstrate a lack of respect for another nation's sovereignty. For example, in *NRDC v. NRC,* the Court of Appeals for the District of Columbia Circuit held that NEPA did not apply to the Nuclear Regulatory Commission's approval of the export of a nuclear reactor and complementary nuclear materials to the Philippines. The Court of Appeals for the District of Columbia Circuit found NEPA inapplicable because of the unique foreign policy interests arising in the nuclear energy and nonproliferation contexts, the potential cultural and legal problems inherent in engaging in an analysis of environmental effects in another country, and the United States' limited oversight of the project once the export permit was issued. *NRDC v. NRC,* 647 F.2d at 1366. The Court of Appeals for the District of Columbia Circuit found that applying NEPA in these circumstances would conflict with § 102(2)(F) of NEPA which requires all federal agencies to

> recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation....

Id. (quoting 42 U.S.C. § 4332(F)). Similarly, in *NEPA Coalition of Japan,* 837 F.Supp. at 467, the court held that NEPA did not apply to activities at United States military bases in Japan because there was a substantial likelihood that treaty relations with Japan would be affected and because United States foreign policy interests outweighed the benefits of preparing an EIS. Finally,

in *Stone* the court found that NEPA's EIS requirement did not apply to certain portions of the United States Army's transport of obsolete chemical munitions from the Federal Republic of Germany ("FRG") to Johnston Atoll, a United States trust territory in the Pacific, so that they could be destroyed. The *Stone* court held that NEPA did not apply to the removal of the munitions from their stockpile and transportation within the FRG because the disposal policy for the munitions was the result of a cooperative agreement between the United States and the FRG and "[a]n extraterritorial application of NEPA to the Army's action in the FRG with the approval and cooperation of the FRG would result in a lack of respect for the FRG's sovereignty, authority and control over actions taken within its borders." *Stone,* 748 F.Supp. at 760. The *Stone* court also held that NEPA did not apply to the transoceanic movement of the munition from the FRG to Johnston Atoll because it was a "necessary consequence" of the stockpiles removal from the FRG and thus "implicate[d] many of the same foreign policy concerns which affect the movement of the weapons through West Germany." *Id.* at 763.

Both *Massey* and the present case are distinguishable from *NRDC v. NRC, NEPA Coalition of Japan* and *Stone* because they do not implicate foreign policy interests in the same way. In *Massey,* the Court of Appeals for the District of Columbia Circuit cited with approval *NRDC v. NRC'* s conclusion that NEPA did not apply where it would be inconsistent with United States foreign policy.*Massey,* 986 F.2d at 535. Nevertheless, the *Massey* court concluded that NEPA did apply to federal actions in Antarctica because Antarctica was not subject to foreign sovereignty, but instead a global commons over which the United States had "some real measure of legislative control." *Id.* at 534. Here, most if not all LWAD sea tests have been conducted in the open oceans or within the United States' EEZ, areas which, like Antarctica as characterized by *Massey,* are global commons (and which in the case of the EEZ are under substantial United States legislative control). Accordingly, the foreign policy implications of applying NEPA in this case are minimal. Plaintiffs further argue that even if the logic of *Massey* is incorrect, and NEPA does not have general extraterritorial effect, NEPA still applies to the LWAD program because the LWAD sea tests have an effect in United States territorial waters and in the United States EEZ, an area "over which the United States has sovereignty or some measure of legislative control." Plaintiffs concede that no LWAD testing has taken place to date in United States territorial waters but argue that due to the mobile nature of marine life, LWAD testing in areas close to territorial waters has inevitably had an effect there. On the record before it, the Court cannot determine whether there has been an effect on the environment in United States territorial waters sufficient to trigger NEPA's environmental assessment requirement. By contrast, the Navy appears to admit that many if not most of the LWAD sea tests to date have been conducted in the EEZ. However, the Navy argues that NEPA does not extend to the EEZ because it is not part of the territory of the United States, or under its exclusive legislative control. According to the terms of the Presidential Proclamation which established it, the EEZ "remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea." EEZ Proc.However, while the EEZ is not part of United States territory, the United States does enjoy certain "sovereign rights" there, including sovereign

rights “for the purpose of exploring, exploiting, conserving and managing natural resources.” *Id.* The Navy concedes that the United States has the power to regulate the environment in the EEZ, but argues that this power does not translate into a duty to apply NEPA extraterritorially. *See* Defs'. Reply and Opp'n at 26. While there are no cases considering the applicability of NEPA to the EEZ, plaintiffs argue that at least two courts have found that NEPA applies in United States trust territories, which are subject to United States control but not considered United States territory. *See People of Enewetak v. Laird,* 353 F.Supp. 811, 818 (D.Haw.1973) (“In view of [NEPA's] expressed concern with the global ramifications of federal actions, it is reasonable to conclude that the Congress intended NEPA to apply in all areas under its exclusive control. In areas like the Trust Territory there is little, if any, need for concern about conflicts with United States foreign policy or the balance of world power.”); *People of Saipan by Guerrero v. United States Dep't of Interior,* 356 F.Supp. 645, 650 (D.Haw.1973) (holding that NEPA applied to United States trust territories because “both the language and legislative history of NEPA evidenced a congressional intent to apply the statute to all areas under United States control”). The Navy argues that these cases are distinguishable because the United States has exclusive legislative control over the trust territories, whereas its control over the EEZ is more limited. However, it is undisputed that with regard to natural resource conservation and management, the area of concern to which NEPA is directed, the United States does have substantial, if not exclusive, legislative control of the EEZ. Because the United States exercises substantial legislative control of the EEZ in the area of the environment stemming from its “sovereign rights” for the purpose of conserving and managing natural resources, the Court finds that NEPA applies to federal actions which may affect the environment in the EEZ.[9] Accordingly, the Court denies the Navy's motion for summary judgment insofar as the Navy asserts that the presumption of extraterritoriality is a bar to the application of NEPA in this case.

2. Is the LWAD Program Subject to Programmatic Review Under NEPA

Plaintiffs contend that the LWAD program as a whole is reviewable under NEPA. The Navy argues that the Administrative Procedure Act (“APA”) only authorizes judicial review of agency actions if they are “final,” 5 U.S.C. § 704, and that plaintiffs' position that the mere existence of the LWAD program creates final agency action which is reviewable for NEPA compliance was rejected by the Supreme Court in *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

In *Lujan,* plaintiffs claimed that the Department of the Interior violated NEPA in the course of implementing a “land withdrawal review program.” In assessing whether the supposed “program” was agency action at all, the Court noted that the subject of the plaintiffs' challenge was the agency's operations in “reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA.” *Id.* at 890. The “program” extended to “1250 or so individual classification terminations and withdrawal revocations.” *Id.* The Supreme Court found this to be no more an agency action, or final agency action, than a “weapons procurement program of the Department of Defense or a drug interdiction program of the Drug Enforcement Administration.” *Id.* Judicial review was only available for a final action that was “an identifiable action or event.” *Id.* at 899. The Supreme Court addressed the claim that the agency was

violating the law by reason of the entire land withdrawal program by emphasizing that the plaintiffs could not "seek *wholesale* improvement of this program by court decree, stating that respondent must direct its attack against some particular "agency action" that causes it harm." *Id.* at 891 (emphasis in original).

The Navy argues that Ninth Circuit cases have also rejected claims for the kind of programmatic NEPA review that plaintiffs seek in this case. In *Northcoast Environmental Center v. Glickman,* 136 F.3d 660 (9th Cir.1998), the Ninth Circuit rejected a claim that the federal government violated NEPA by failing to prepare an EA or EIS for an inter-agency timber management plan for Port–Orford cedars (the "POC plan"). In holding that the POC plan was not final agency action subject to judicial review, the court considered NEPA's requirements, recognizing that "[a]n EIS is not necessary where a proposed federal action would not change the status quo" and that "[l]ong-range aims are quite different from concrete plans and specific undertakings...." *Id.* at 668. The Ninth Circuit found that none of the elements of the POC plan had "an actual or immediately threatened effect," that the POC plan did not "significantly affect the quality of the human environment," that the POC plan merely "set forth guidelines and goals for POC research, management strategies and information sharing," and that the plan did not propose "site specific activity" or "call for specific actions directly impacting the physical environment." *Id .* at 670. The Ninth Circuit concluded that the POC program in its then current form did not "call for specific enough action to trigger NEPA's procedural requirements...." *Id.* However, the Ninth Circuit noted that the agencies had represented that they would undertake a complete NEPA analysis when "specific POC management plans are implemented or proposed" and that plaintiffs could obtain judicial review when "a discrete agency action is called for." *Id.*

Plaintiffs respond that *Lujan* and *Northcoast* do not preclude their claim for several reasons. First, plaintiffs argue that their claim is not subject to the "final agency action" requirement because it challenges a failure to act, rather than an improper act. Plaintiffs argue that their claim under the APA is for administrative action "unlawfully withheld or unreasonably delayed." 5 U.S.C., § 706(1). Plaintiffs argue that courts have recognized that while the APA typically requires "final agency action" before an agency decision is ripe for review, section 706(1) provides "an exception to the final agency action requirement." *ONRC Action v. Bureau of Land Management,* 150 F.3d 1132, 1137 (9th Cir.1998); *see also Ohio Forestry Assoc., Inc. v. Sierra Club,* 523 U.S. 726, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) ("a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper"). Second, plaintiffs argue that the Navy's considered decision not to pursue programmatic review for LWAD, the creation of the LWAD program itself, and several of the advance planning documents prepared by the LWAD program that envision multiple sea tests all constitute final agency action reviewable under the APA. Generally, an agency's decision not to prepare environmental documents required by NEPA constitutes final agency action subject to review. *See Portland Audubon Society v. Babbitt,* 998 F.2d 705, 708 (9th Cir.1993) (BLM's decision not to prepare a Supplemental EIS under NEPA was final agency action). There is evidence that suggests the Navy considered whether to prepare a programmatic analysis under NEPA, but

rejected the idea. *See* Tilden Depo. at 163 (testifying that "[t]here have been limited discussions, outside attorney-client discussions, as to whether LWAD was a program under NEPA); Tilden Depo at 164 ("ONR's understanding has been and remains that LWAD is not a program under NEPA"). Plaintiffs argue that under *Portland Audubon Society,* this decision not to pursue programmatic review is itself reviewable agency action.

Even assuming that plaintiffs are correct that a challenge based on the alleged failure of a "program" to adhere to NEPA requirements can be brought under section 706(1) of the APA, it would be inconsistent with the holding of *Lujan* to allow such a challenge without first determining whether or not that program is sufficiently focused and developed to be a logical object of programmatic review. Similarly, while *Portland Audubon Society* concerns a failure to prepare a document that was clearly required by NEPA, the critical question here is whether the LWAD program as a whole, rather than its component parts, is appropriately analyzed under NEPA. It would be unreasonable to hold that any discussion, however cursory, of whether a program was reviewable under NEPA automatically creates an opportunity review under NEPA. Somewhat paradoxically, this suggests that a court must decide whether programmatic review under NEPA is appropriate before determining whether an agency's decision not to conduct programmatic review is agency action reviewable under the APA. Plaintiffs argue that unlike the agency actions *Lujan* and *Northcoast Environmental,* the LWAD program is focused and concrete enough to be reviewable for NEPA compliance. *Lujan* dealt with a general program of land review, 1250 individual classification terminations and withdrawal revocations which were apparently unconnected to each other through any higher level of agency decisionmaking. 497 U.S. at 890–93. By contrast, plaintiffs argue that LWAD is narrowly focused on its mission of testing a relatively small set of technologies to prepare them for acquisition by the Navy. Plaintiffs also argue that, unlike *Lujan,* decisionmaking about the individual sea tests is concentrated at the program level in the LWAD Program Manager and Advisory Board, who determine when and where the sea tests will take place, what systems will be tested, and what environmental mitigation procedures, if any, will be implemented. In *Northcoast Environmental,* the NEPA challenge was to interagency documents which reflected the forest planning process at a highly preliminary stage and did not "call for" or "create activities which impact the physical environment," or commit any resources to the execution of such activities. 136 F.3d at 670. Again by contrast, plaintiffs argue that LWAD's failure to engage in programmatic environmental review is ripe for adjudication because it is a fully developed and staffed program that has planned and conducted numerous sea tests that have already directly impacted the environment. Moreover, plaintiffs argue that several of LWAD's planning documents, such as the report to the Advisory Board described above which discusses locations and parameters for specific future sea tests as much as three years in advance, *see* A.R. 49, Enc. 7, are themselves sufficiently detailed and call for specific enough action to qualify as independently reviewable agency action.

Plaintiffs argue that their position is supported by the fact that LWAD meets NEPA's implementing regulations' criteria for a program which must prepare a programmatic EIS ("PEIS").[10] NEPA regulations state that "[p]roposals or parts of proposals which are related to each other closely

enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). Agencies "use the criteria for scope to determine which proposal(s) shall be the subject of a particular statement." 40 C.F.R. § 1502.4(a) (internal citation omitted). The scoping criteria, in turn, require a unitary and comprehensive NEPA analysis for "connected actions" or "cumulative actions." 40 C.F .R. §§ 1502.4(a), 1508.25(a)(1) and (2); *Churchill County v. Norton,* 276 F.3d 1060, 1076 (9th Cir.2001). By statute, connected actions are those that (i) automatically trigger other actions which may require environmental statements, (ii) cannot or will not proceed unless parts of a larger action are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification. *Id.* The Ninth Circuit has adopted a strict definition of connected actions, holding that even projects which may benefit from each other do not need to be evaluated programmatically unless they are "inextricably intertwined." *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service,* 56 F.3d 1060, 1068–69 (9th Cir.1995). Cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions.... Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

Plaintiffs argue that the LWAD sea tests are "connected" because they are part of an integrated program of technology testing where each sea test is part of a progression towards the Navy's goal of developing experimental anti-submarine warfare technologies to the point where they can be acquired for actual operational use. Plaintiffs also argue that the effects of LWAD sea tests are cumulative in that many of the tests to date have been concentrated in particular geographic areas which are likely to be inhabited by the same species, if not the same actual populations, of endangered or threatened marine wildlife. In addition, plaintiffs argue that the high likelihood of future repetitive testing should be taken into account in the analysis of cumulative effects. *See North Cascades Conservation Council v. United States Forest Service,* 98 F.Supp.2d 1193, 1197 (W.D.Wash.1999) (when determining whether there may be a cumulative impact on the environment all "past, present and reasonably foreseeable future actions" need to be considered).
The Court finds that the LWAD program, as distinct from its component parts, is not subject to NEPA review. The discussion of NEPA review in *Conner v. Burford,* 848 F.2d 1441, 1446–51 (9th Cir.1988), is instructive in this regard. In *Conner,* the Ninth Circuit rejected a claim that a comprehensive EIS was necessary for the Bureau of Land Management's ("BLM") issuance of oil and gas leases in areas of two national forests. Instead of looking at the leasing program as a whole, the Ninth Circuit separated the leases into two separate categories based on the presence or absence in the lease of a "no surface occupancy" ("NSO") stipulation. *Id.* at 1444. The Ninth Circuit held no NEPA review was necessary for the leases that contained NSO stipulations because those stipulations prevented the leaseholders from occupying or using the leased parcels without further BLM approval. *Id.* Because the government retained the right to prevent use of the parcel, the Ninth Circuit held that there had been no "irreversible commitment of resources" which would necessitate the filing of an EIS. *Id.* at 1447. By contrast, the Ninth Circuit considered the issuance of leases that did not contain NSO stipulations to be a "point of commitment" which triggered the need to file an

EIS because once the lease was issued BLM could regulate activity on the parcel but "no longer ha[d] the ability to prohibit potentially significant inroads on the environment. *Id.* at 1451. The kind of general planning in which LWAD engages apart from the planning associated with the organization and execution of particular sea tests does not call for or create activities which impact the environment and is not an irreversible commitment of resources. By the same token, the preliminary advance schedules and plans for sea tests appear to be frequently subject to cancellation or substantial modification. Resources are not firmly committed, and a clear picture of what actions that potentially impact the environment does not emerge, until LWAD engages in focused planning for a particular sea test. Moreover, although the LWAD program appears to test a relatively small number of technologies in a relatively small number of locations, the tests are neither connected nor cumulative. Rather than being inextricably intertwined, the objectives of each LWAD sea test appear to stand alone to a significant degree, and the success of the sea tests does not appear to depend on them all occurring as planned. In addition, even assuming that multiple LWAD sea tests are conducted in the same general test areas, plaintiffs have not demonstrated for purposes of summary judgment that those sea tests have the kind of cumulative effect that would subject the entire program to NEPA review.

Even assuming the LWAD program is an action which for which the Navy can provide programmatic NEPA review, plaintiffs have failed to meet their burden on motion for summary judgment to establish that the Navy has acted arbitrarily in choosing to conduct its environmental analysis on a sea-test-by-sea-test rather than programmatic basis. *Churchill County,* a recent Ninth Circuit case, demonstrates the degree of deference due to a federal agency's decision not to engage in programmatic NEPA review. *Churchill County* concerned provisions of the Pyramid Lake Water Rights Settlement Act ("Settlement Act"), legislation enacted by Congress for the purpose of, *inter alia:* (1) equitably apportioning waters of the Truckee River, Carson River, and Lake Tahoe between the states of California and Nevada; (2) modifying existing Federal Reclamation projects to benefit wildlife, water users, and recreation; (3) fulfilling the goals of the ESA by promoting the enhancement of the Pyramid Lake fishery; (4) authorizing the acquisition of water rights for fish and wildlife; and (5) protecting and enhancing wetlands. *Churchill County,* 276 F.3d at 1070. The Fish and Wildlife Service ("FWS") prepared an EIS in conjunction with Section 206(a) of the Settlement Act which directed the Secretary of the Interior to acquire and manage water and water rights sufficient to support 25,000 acres of wetlands. 276 F.3d at 1070. Other sections of the Settlement Act directed additional "actions involving water allocation and usage in the region" such as allocation of water between California and Nevada, negotiation with California and Nevada to reach an agreement governing operation of reservoirs, acquisition of water rights, and improvement of the Newlands Reclamation Project. *Id.* at 1070–71. Plaintiffs argued that the EIS prepared under Section 206(a) was inadequate because it failed to account for the cumulative and synergistic effects of all of the provisions of the Settlement Act, and that a PEIS for the Settlement Act in its entirety was necessary.

In examining plaintiffs' challenge in *Churchill County,* the Ninth Circuit first reviewed the Supreme Court's holding in *Kleppe v. Sierra Club,* 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976), rejecting a NEPA challenge for failure to prepare a PEIS for the North Great Plains regions implementation of a national coal-leasing program.

> In *Kleppe,* the Supreme Court acknowledged that NEPA may require a "comprehensive" EIS "in certain situations where several proposed actions are pending at the same time." [*Kleppe,* 427 U.S. at 409].... [However] [t]he Court held that § 102(2)(C) of NEPA did not require a regional EIS in the absence of a proposal for action of regional scope. *Id.* at 399. In addition, the Court found that Plaintiffs' "desire for a regional environmental impact statement [could not] be met for practical reasons." *Id.* at 401. Because a regional proposal would "define fairly precisely the scope and limits of the proposed development," *id.* at 402, the Court concluded that in the absence of such a proposal, "there would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA." *Id.*
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> Further, the Court held that "[a] court has no authority to ... determine a point during the germination process of a potential proposal at which an impact statement should be prepared." *Id.* at 406. A final EIS is required only at the time the agency "makes a recommendation or report on a proposal for federal action." *Id.* (quoting Aberdeen & Rockfish R.C. v. SCRAP, 422 U.S. 289, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975)).
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> > Finally, the Court recognized that "when several proposals ... that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental impacts must be considered together." *Id.* at 410. According to the Court, "[o]nly through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Id.* However, the Court stated that the determination of whether cumulative environmental impacts exist so as to require a comprehensive impact statement "is a task assigned to the special competency of the appropriate agencies." *Id.* at 413–14. Therefore, a party challenging an agency's refusal to prepare a comprehensive EIS must show that the agency acted arbitrarily in making that determination. *Id.* at 412.

Churchill County, 276 F.3d at 1075. The *Churchill County* court then reviewed post-*Kleppe* cases discussing PEIS requirements. For instance, the court noted that in *Nat'l Wildlife Fed'n v. Appalachian Regulatory Comm'n,* 677 F.2d 883 (D.C.Cir.1981), the Court of Appeals for the District of Columbia Circuit found two questions particularly useful in determining whether an "agency's environmental vision" was arbitrary and capricious: "(a) Could the programmatic EIS be sufficiently forward looking to contribute to the decisionmakers' basic planning of the overall program? and, (b) Does the decisionmaker purport to 'segment' the overall program, thereby unreasonably constricting the scope of primordial environmental evaluation?" *Id.* at 1076 (quoting *Nat'l Wildlife Fed'n,* 677 F.2d at 889). In *Thomas v. Peterson,* 753 F.2d 754 (9th Cir.1985), the Ninth Circuit determined that NEPA

required a comprehensive EIS analyzing the combined effects of the construction of a timber road and the resulting timber sales that it would facilitate because "[n]ot to require this would permit dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Id.* at 758. The *Churchill County* court summarized the holding of another Ninth Circuit case, *City of Tenakee Springs v. Clough,* 915 F.2d 1308 (9th Cir.1990), as follows we stated that an agency must prepare both a programmatic EIS and a site-specific EIS where there are large scale plans for regional development. At least when the projects in a particular geographical region are foreseeable and similar. *Churchill County,* 276 F.3d at 1077 (citing *Tenakee Springs,* 915 F.2d at 1312) (internal quotations omitted).

The *Churchill County* court found that actions required by the different sections of the Settlement Act were interrelated, and that

> It is not readily apparent how the Service proposed to get a complete picture of the cumulative environmental impacts [by preparing the Section 206(a) EIS] without including in its analysis the [other] water-related actions and activities already underway or anticipated. It would seem quite reasonable, in fact, for the responsible agencies to analyze the actions required under the Settlement Act and their cumulative impacts in one document. *Id.*

The Ninth Circuit rejected the FWS's argument that it had no obligation to prepare a PEIS encompassing actions taken outside of Section 206(a) because none of those actions had ripened into concrete "proposals." First, the Ninth Circuit noted that

> the [NEPA] regulations do not require a final proposal. Rather, under 40 C.F.R. § 1508.23, a proposal "exists at that stage in the development of an action when an agency subject to the Act has a *goal and is actively preparing to make a decision on one or more alternative means or accomplishing that goal" so that "the effects can be meaningfully evaluated.* Reasonable forecasting and speculation is thus implicit in NEPA...." *City of Davis v. Coleman,* 521 F.2d 661, 676 (9th Cir.1975).

Id. at 1078. The Ninth Circuit found FWS's argument to be unpersuasive because a number of the federal activities associated with the Settlement Act did appear to have matured into agreements or pilot projects, and the Department of the Interior had itself characterized the actions as proposals. *Id.* In any event, the Ninth Circuit found that this question was not entirely relevant because it was clear that federal officials responsible for administering the Settlement Act had initially considered analyzing it on a programmatic basis but had elected not to do.

Nevertheless, in spite of the fact that the Ninth Circuit determined that a PEIS would have been feasible and that a decision to prepare one would have been supported by the NEPA regulations, it held that the FWS did not violate NEPA in failing to prepare a PEIS because

> although we can see that [FWS's] decision was a close call, the record does not support a conclusion that the agency's goal was to minimize the possible cumulative environmental impacts by segmenting the wetlands water rights acquisition program from the analysis of other foreseeable actions. The Settlement Act is unwieldy and potentially contradictory in its various requirements.... We cannot, as Plaintiffs may wish, sanction the use of NEPA's EIS requirements to challenge the policy goals served by the Settlement Act.

Id. at 1079.

In the present case, the record does not support a conclusion that the Navy's goal in pursuing environmental review on a sea-test-by-sea-test basis is to underplay the cumulative aspects of the sea tests or otherwise evade comprehensive environmental review. Individual LWAD sea tests will still be subject to NEPA requirements and, absent a showing of arbitrary action by the Navy, the court"cannot assume that government agencies will not comply with their NEPA obligations in later stages of development." *Conner,* 848 F.2d at 1448 (citing *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).

C. ESA

ESA was enacted in 1973 in order to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] ... to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). NMFS and FWS share responsibility for administering ESA. 50 C.F.R. § 402.01(b). ESA requires each federal agency to "insure that any action authorized, funded, or carried out by [a federal] agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [of the Interior or of Commerce] ... to be critical." 16 U.S.C. § 1536(a)(2). Section 7(a)(2) of ESA further requires that each federal agency make a determination regarding the impact of its actions on species "in consultation with and with the assistance of the Secretary [of the Interior or of Commerce]." 16 U.S.C. § 1536(a)(2). The consultation referred to in Section 7(a)(2) requires each agency contemplating an action likely to affect a species listed as endangered or threatened to confer with NMFS and/or FWS before taking the action. 16 U.S.C. § 1536(a)(2). Both the NMFS and FWS have defined federal "actions" subject to the Section 7(a)(2) consultation requirements as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02.

Consultation pursuant to Section 7(a)(2) of ESA can be informal and/or formal. Informal consultation is defined as "an optional process that includes all discussions, correspondences, etc. between

[NMFS and/or FWS] and the Federal agency ... prior to formal consultation, if required." 50 C.F.R. §§ 402.02, 402.13(a). "If during informal consultation it is determined by the Federal agency, with the written concurrence of [NMFS and/or FWS], that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated and no further action is necessary." *Id.* § 402.13(a). With limited exceptions, if it is determined that an action "may affect listed species or critical habitat," formal consultation is required. *Id.* § 402.14. Formal consultation is defined as "a process between [NMFS and/or FWS] and the Federal agency that commences with the Federal agency's request for consultation under Section 7(a)(2) of the Act and concludes with the ... issuance of a biological opinion under Section 7(b)(3)." *Id.* §§ 402.02,402.14; *see also* 16 U.S.C. § 1536(b)(3). Following formal consultation, NMFS and/or FWS issues a document indicating "whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Id.* § 402.02.

Plaintiffs argue that the Navy must consult with NMFS as to the environmental consequences of the LWAD program as a whole, rather than on a sea-test-by-sea-test basis, because "the LWAD program guides and constrains individual sea tests by selecting the time, place, location, and even the environmental mitigation that will apply to each sea test." Pls.' Mot at 38. Plaintiffs contend that the creation of the centralized LWAD program and its establishment of specific criteria for sea tests constitutes an "agency action" requiring consultation with NMFS, even if it is not formalized in a programmatic planning document. Plaintiffs cite several cases where the Ninth Circuit has required an agency to engage in comprehensive or programmatic consultations of resource management criteria. *See Conner,* 848 F.2d 1441; *Lane County Audubon Society v. Jamison,* 958 F.2d 290 (9th Cir.1988), *Pacific Rivers Council v. Thomas,* 30 F.3d 1050 (9th Cir.1994).

In *Conner,* the BLM consulted pursuant to the ESA with FWS in conjunction with the Department of the Interior's decision to sell oil and gas leases for more that a million acres of land in the Flathead and Gallatin National Forests. FWS found that it did not have sufficient information to analyze all phases of the oil and gas activities, but nevertheless issued a biological opinion approving the leasing phase of the program because that phase, standing alone, would have no adverse effect on listed species. *Conner,* 848 F.2d at 1452. The Ninth Circuit held that FWS had acted arbitrarily and capriciously in permitting the leasing phase without preparing a comprehensive biological opinion for all phases of the project. *Id .* at 1453–54. *Pacific Rivers* concerned BLM's issuance of land and resources management plans ("LMRP") for two National Forests in Washington state. The LMRPs "establish[ed] forest-wide and area-specific standards and guidelines to which all projects [including timber sales, road building and resource conservation measures] must adhere for up to 15 years." *Pacific Rivers,* 30 F.3d at 1052. The Ninth Circuit held that the LMRPs constituted agency action which required consultation under ESA before any potential activity governed by the guidelines set forth in the LMRPs could go forward. *Id.* at 1056–57. Similarly, *Lane County* concerned BLM's issuance of a document entitled "Management Guidelines for the Conservation of the Northern Spotted Owl, FY 1991 through FY 1992" ("Management Guidelines") which "essentially sets forth the criteria for selection of land for logging in the millions of acres

administered by BLM in Washington, Oregon and California." *Lane County,* 958 F.2d at 291. The Ninth Circuit held that the Management Guidelines constituted agency action and enjoined all timber sales in the area until BLM conducted ESA consultation on the Guidelines as a whole. *Id.* at 293.

The Navy argues that programmatic consultation for LWAD is not appropriate for a number of reasons. First, as it did with NEPA, the Navy argues that the presumption against extraterritoriality applies to plaintiffs' ESA challenge. ESA's implementing regulations interpret ESA's consultation requirements to apply to all federal agency actions authorized, funded or carried out not only "in the United States" but also "upon the high seas." 50 C.F.R. § 402.01. The Navy concedes that ESA applies to LWAD's actions in United States territorial waters and on the high seas, including the United States EEZ. Nonetheless, the Navy appears to argue that ESA would not extend to LWAD's actions if they occurred in the territorial waters of another nation, and that if consultation on such an action in unnecessary, a programmatic consultation for LWAD as a whole is inappropriate. This argument is unpersuasive for several reasons. First, there does not appear to be any evidence that LWAD has conducted or intends to conduct actions in another nation's territorial waters. To preclude programmatic consultation on the basis of speculation about where an action might conceivably be scheduled is contrary to the purposes of the environmental laws. More importantly, there is no reason why programmatic consultation under ESA could not be limited to consideration of the environmental effects of LWAD projects conducted in the United States or on the high seas, thereby avoiding extraterritoriality problems.

Second, the Navy argues that the LWAD program as a whole cannot constitute "agency action" subject to review under ESA because there is nothing beyond the effects of individual sea tests to consult on and because programmatic consultation would be impracticable. The Navy argues that in the cases cited by plaintiff where programmatic consultation was required, the agency was required by statute to create a program. For example, the Navy argues that the Mineral Lands and Mining Act, 30 U.S.C. § 1600 *etseq.,* required the Secretary of the Interior to administer the program for the assignment of oil and gas leases at issue in *Conner* and the Forest and Rangeland Resources Act, 16 U .S.C. § 1600 *et seq.,* required the BLM to issue LRMPs at issue in *Pacific Rivers.* The Navy argues that LWAD is distinguishable because it is not a statutorily mandated program. The Navy also distinguishes LWAD from the programs at issue in *Pacific Rivers* and *Lane County* because in those cases agencies promulgated programmatic planning documents, such as LRMPs and the Management Guidelines, which are clearly "agency actions." The Navy argues that plaintiffs have not identified a similar programmatic document that guides and directs LWAD's efforts in the way that a forest plan or LRMP controls future agency action. Finally, the Navy seeks to distinguish *Conner* by arguing that its holding is limited to the proposition that the effects of an agency action must be analyzed in their entirety rather than artificially separated into smaller segments and analyzed incrementally. The Navy argues that the only issue the Ninth Circuit faced squarely in *Conner* was FWS's issuance of a favorable biological opinion that analyzed the environmental effects of the leasing phase of oil and gas exploration in isolation, instead of taking into account the inevitable subsequent phases of exploration for, and exploitation of, oil and gas.

The Navy argues that *Conner* does not suggest that a program such as LWAD which merely coordinates individual sea tests, the occurrence of which are neither inevitable nor predictable with any accuracy, must be reviewed under ESA on a programmatic basis. In the context of the present case, the Navy argues that *Conner* requires it to analyze the effects of each sea test in its entirety, which it does, but does not require it to lump together separate sea tests, which it characterizes as independent agency actions, conducted in widely dispersed geographic areas and utilizing disparate technologies.

The Navy also argues that the cases cited by plaintiff are distinguishable, and programmatic consultation under the ESA for LWAD is impractical, because LWAD sea tests are unpredictable as to time or place. The Navy argues that the cases cited by plaintiffs all involve foreseeable actions and impacts in a discrete, geographically-limited territory. For example, the oil and gas leasing program in*Conner* encompassed 1,300,000 acres of forest land in the Gallatin and Flathead National Forests. *Conner,* 848 F.2d at 1442.Similarly, the LRMPs in *Pacific Rivers* were limited to the Wallowa–Whitman and Umatilla National Forests. *Pacific Rivers,* 30 F.3d at 1052. The Northern Spotted Owl Guidelines in *Lane County* addressed the selection of logging land in Washington, Oregon, and California, with a focus on the approximately 1,149,945 acres of old growth forest suitable for spotted owl habitat in western Oregon.*Lane County* 958 F.2d at 291. Although the areas subject to programmatic environmental review in these cases were relatively extensive, the Navy argues that courts specifically found that studying them comprehensively was feasible. For example, in *Conner*the Forest Service argued that it lacked sufficient data about post-leasing activities to prepare comprehensive biological opinions which could address the environmental effects of those activities. However, the Ninth Circuit found that the FWS had a large volume of existing biological information at its disposal, and that three-quarters of the area that had been studied for possible leasing had been designated as essential or occupied habitat for protected species. *Conner,* 848 F.2d at 1453–54. “Indeed, the environmental assessments prepared by the Forest Service contained detailed information on the behavior and habitats of the species, and discussed the likely impact of various stages of oil and gas activities.” *Id.* at 1454. The Navy argues that, by contrast, LWAD could conduct a sea test in the littoral off the coast of anywhere in the world, or on the high seas. The Navy further argues that without knowing the general area where a specific sea test might occur, let alone the open-ended series of sea tests envisioned by LWAD, it is impossible to conduct a meaningful programmatic consultation given the variety of marine species that might be encountered. Similar difficulties are assertedly presented by the fact that the technology to be tested in a given sea test is not usually finalized until one or two months before the test. Cert. ¶¶ 20–23, 25.

Plaintiffs argue that the fact that the programmatic ESA challenges upon which they rely were directed at programs mandated by statute and/or governed by a single “programmatic planning document” does not mean that such challenges must be limited to those facts. Plaintiffs argue that the Ninth Circuit has repeatedly stated the principle that “Congress intended to enact a broad definition of agency action in the ESA.” *Pacific Rivers,* 30 F.3d at 1054; *see also Lane County,* 958 F.2d at 294 (holding that “[t]his court interprets the term ‘agency action’ broadly); *Conner,* 848 F.2d

at 1453 (“we interpret the term ‘agency action’ broadly”). Plaintiffs argue that the programs at issue in *Conner, Pacific Rivers* and *Lane County* were agency actions, and required programmatic consultation, not because of their particular formal structure, but because they governed and constrained a set of federal agency activities that had the potential to affect endangered and threatened species. For example, plaintiffs argue that in *Lane County,*programmatic consultations were required not because of the existence of the forest plan *per se,* but because the “impact of each individual sale on owl habitat” could not be measured “without reference” to that plan. *Lane County,* 958 F.2d at 294. Plaintiffs argue that the government's establishment of an institutional structure for LWAD, its grant of funding to LWAD for use in planning and conducting sea tests, and the fact, as evidenced by numerous planning documents and meeting minutes, that LWAD has created goals and guidelines for sea testing, all demonstrate that the LWAD program as a whole is agency action subject to ESA review.

With regard to the impracticality of programmatic ESA review of LWAD, plaintiffs argue that LWAD's actions are foreseeable and that the impact of those actions often affects specific known biogeographic regions and wildlife populations. Plaintiffs argue that although the exact technology tested in a given sea test and the sea test's locations may vary, LWAD regularly tests a relatively narrow range of high-intensity sonars, and tends to conduct multiple sea tests in the same general locations. In addition, plaintiffs argue that the Navy's contentions that advance planning for sea tests is not concrete and that the details of location and technology to be tested are not known until the last minute are not supported by the evidence. Plaintiffs argue that 70% of all sea tests proposed prior to the filing of this lawsuit took place at the time and location for which they were scheduled. Moreover, LWAD documents accurately stated the approximate time and place that these sea tests would take place an average of eleven months before they did took place. Plaintiffs argue that even Tilden, the LWAD Program Manager, admitted that “we are generally able to plan or at least discuss concrete requirements and opportunities to a year out.” Tilden Depo. at 137.

After examining the record, the Court concludes that LWAD is not subject to programmatic ESA review. In the absence of a programmatic planning document such as the ones challenged in *Pacific Rivers* and *Lane County,* it appears that an agency has substantial discretion to determine whether a “program” such as LWAD or its component elements are the more appropriate object of ESA consultation. *Conner* suggests that an agency will be required to conduct programmatic review only if an agency's decision not to engage in programmatic or comprehensive ESA consultation would lead to inappropriate segmentation of the ESA analysis and allow actions to go forward that will inevitably result in particular consequences without subjecting those inevitable consequences to ESA review at the outset. Thus the relevant analysis under ESA appears to be highly analogous to the analysis the Court has already engaged in with regard to programmatic NEPA review. Here, the record does not suggest that the Navy decided to consult with NMFS on a sea-test-by-sea-test rather than comprehensive basis in an attempt to avoid environmental review. Rather, the Navy appears to have assessed the difficulties of engaging in programmatic consultation, such as the lack of concrete advance information about the locations of sea tests and the technologies to be tested,

weighed them against the benefits of programmatic consultation with NMFS, and determined that programmatic consultation was not necessary or worthwhile in light of the Navy's pursuit of consultations in connection with individual sea tests. Under the circumstances, that determination was not arbitrary and capricious.

IV. CONCLUSION

For the reasons discussed above, defendants' motion for summary judgment is GRANTED in part and DENIED in part, and plaintiffs' motion for summary judgment is DENIED.